in higher charges for many customers," particularly for shorter-distance calls.[40] The new plan adds three hours daily to the highest rate category and virtually eliminates the sharp drop in rates after 11:00 p.m.[41] AT&T has also announced a crackdown on its 20 million "occasional callers" — those callers who make fewer than three long distance calls per month — by forcing these customers into a pricing plan that will increase their rates.[42]

AT&T and MCI seek to deny discounts not only to low-volume customers, but also to higher-volume customers who are not price sensitive. As Professor Schmalensee points out, "[t]he combination of rising basic rates and optional calling plans, which the long distance carriers change over time, effectively exploits many customers' lack of information and inertia. With their pricing, the interexchange carriers segment the market, separating the active 'bargain-hunters' from the 'victims.'" Schmalensee Aff. ¶ 15. For example, when LCI announced recently that it was moving to one-second billing, AT&T responded in trade publications that it would offer similar service when requested but would not advertise the program, and indeed had secretly been willing to bill in six-second increments if the customer specifically asked and paid a monthly fee.[43] By keeping its offering a secret, AT&T is able to retain per minute billing for

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40. Id.

41. Id.

42. See Now on 'Offensive': AT&T's Armstrong Announces Job Cuts, Says Senior Management 'Owns Strategy', Communications Daily, Jan. 27, 1998, at 2.

43. Long Distance Carriers Move Toward Per-Sec. Billing Amid Competition, Communications Daily, Dec. 4, 1997, at 2.

the vast majority of its customers.[44] It also should be noted that Southern New England Telecommunications Corp. ("SNET") has offered per-second billing in Connecticut for more than a year and a half.[45]

To the extent that there have been price reductions, they consist simply of passing only a portion of the interexchange carriers' savings from recent access charge reductions, and were effected only because the Commission required AT&T to share some of its windfall with residential consumers who pay undiscounted basic rates. See Schmalensee Aff. ¶ 12. In a competitive industry, regulators do not need to strong-arm competitors into passing on cost-savings to consumers. Id. ¶ 10 ("If the long distance market were truly competitive, the incumbent interexchange carriers would have passed through to consumers the reductions in both access and nonaccess cost.").

The major carriers themselves concede that they do not compete for the business of the lowest-volume callers. See id. ¶ 16. They have in the past claimed that these customers are served below cost, but that does not explain why mid-volume callers are denied discounts. See id. ¶¶ 16-19. Besides, even if claims of below-cost pricing were true, they would only highlight the need for additional competition to place pressure upon all carriers to lower operational and marketing costs.

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44. Id.

45. Communications Daily, Dec. 5, 1997, at 6.

C. Market Evidence Confirms that Southwestern Bell's Entry into the InterLATA Market in Oklahoma Will Benefit Consumers

Southwestern Bell's entry into interLATA services in Oklahoma will provide the needed competition and benefit long distance consumers through lower prices and/or higher quality service. Moreover, by chipping away at costly barriers between local and long distance services, Southwestern Bell's entry will bring further benefits. The United States is the only nation in the world that rigidly divides local from long distance telephone service and thereby deprives consumers the benefits of both vertical integration and additional competitors in long distance. Kahn & Tardiff Aff. ¶ 74, n.69. Despite hypothetical possibilities of anticompetitive conduct, every other country that has permitted competition in long distance has decided that the benefits of allowing incumbent LECs to participate outweighs possible anticompetitive concerns. Id. The record of incumbent LECs' competitively beneficial provision of vertically related services makes clear that the unanimous conclusion of all these other nations is correct.

1. Evidence of Competition Where LECs Have Been Allowed To Offer Long Distance

Uniform historical experience confirms the likely benefits of in-region interLATA entry by Southwestern Bell. As the Commission itself has recognized, the "recent successes of [SNET] and GTE in attracting customers for their long distance services illustrates the ability of local carriers to garner a significant share of the long distance market rapidly"; "recent studies" based upon these positive market experiences "have predicted that AT&T's share of the long distance market may fall to 30 percent with BOC entry"; and such "additional competition in the long distance market is precisely what the 1996 Act contemplates and is welcomed." Michigan Order ¶ 15.

The best example of this healthy competition is found in Connecticut. Long distance customers in that state have benefitted from SNET's price competition with AT&T and the other incumbents since SNET entered the interstate market in 1994.[46] SNET has competed effectively by offering rates 15 to 25 percent below AT&T's — a scenario that augers well for the consumers of Oklahoma when Southwestern Bell is allowed to offer long distance in the state. Kahn & Tardiff Aff. ¶ 76.[47] These savings have especially benefitted low-volume callers who, prior to SNET's entrance, had disproportionately stayed with AT&T because they were ignored

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46. Consumers of intrastate services also have benefitted, as AT&T responded to SNET's long distance offerings with competitive intrastate offerings.

47. While Professor Schwartz of DOJ (and AT&T) has admitted "some SNET . . . customers may well be enjoying better rates as a result of [SNET's] interLATA entry," Schwartz Supp. Aff. ¶ 84, he has nevertheless contended that predictions of price reductions based on the SNET record are "exaggerated." Id. ¶ 81 n.33. He claims that these predictions fail adequately to account for discount rates already available from interexchange carriers. Id. However, Professor Schwartz overstates the impact of the incumbents' discount rates. First, these discount plans are not as widely used as Professor Schwartz suggests. Nationwide, only 38.4 percent of AT&T households had a calling plan in 1996. Schmalensee Aff. ¶ 12; see also Pradnya Joshi, The Big Savings Maze, Newsday, Jan. 11, 1998, at F8 (over 60 percent of long distance customers pay basic rates). Second, for many customers, these discount plans are not "discounts" at all. For example, AT&T's One Rate plan (15 cents per minute) is more expensive for AT&T customers who make the majority of their calls on weekends, when lower rates apply. Schmalensee Aff. ¶ 14. AT&T's One Rate Plus plan (10 cents per minute) requires a customer to pay a monthly fee of $4.95, which makes this plan unsuitable for low-usage customers. Id. ¶ 15 n.20. Third, Professor Schwartz fails to acknowledge that the lowest interLATA rates are significantly higher than the lowest rates for intraLATA service, suggesting that there is room for further price reductions triggered by Southwestern Bell's entry into the market. Kahn & Tardiff Aff. ¶ 71. Fourth, Professor Schwartz's analysis is highly selective. For instance, he never adequately accounts for the benefits of intraLATA toll dialing parity that will accompany the approval of Southwestern Bell's section 271 application. See 47 U.S.C. § 271(e)(2).

by other carriers. SNET has shown both a willingness and the ability to compete for this segment of the market, attracting a much higher share of interstate customers than interstate revenues.[48]

To compete with SNET, AT&T sought authority to reduce its long distance rates specifically for Connecticut.[49] AT&T's stated reason for the petition was "the rapidly emerging competition from SNET in Connecticut."[50] AT&T thus effectively admitted that it faces more intense competition in Connecticut than elsewhere because the incumbent LEC has been allowed to enter the long distance market.[51]

The two geographic corridors running from New York City and Philadelphia to New Jersey offer another example in which incumbent LECs — in this case Bell Atlantic and NYNEX — have competed in in-region, interLATA services by setting prices below those of the major carriers. AT&T concedes that Bell Atlantic's corridor rates are as much as one-third lower than AT&T's,[52] and credits Bell Atlantic's widespread marketing of "sav[ings] over

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48. See Susan Jackson, A Telecom Yankee Defends Its Turf, Business Week, Oct. 28, 1996, at 167.

49. See AT&T Comments, Market Definition, Separations, Rate Averaging and Rate Integration, at 29, Policy and Rules Concerning the Interstate, Interexchange Marketplace & Implementation of Section 254(g), CC Docket No. 96-61 (FCC filed Apr. 19, 1996) ("AT&T Rate Averaging Comments"); AT&T Corp.'s Petition for Reconsideration at 2-5, Policy and Rules Concerning the Interstate, Interexchange Marketplace and Implementation of § 254(g), CC Docket No. 96-61 (FCC filed Sept. 16, 1996).

50. AT&T Petition for Reconsideration at 2.

51. See id. at 2-5; AT&T Rate Averaging Comments at 29.

52. AT&T Corp.'s Petition for Waiver and Request for Expedited Consideration, Attachment A, AT&T Petition for Waiver of Section 64.1701 of the Commission's Rules, CC Docket No. 96-

AT&T's basic rates" for Bell Atlantic's 20 percent market share of interstate corridor calls.[53] AT&T and MCI sought permission to reduce their rates in these corridors precisely because they face more intense competition there than elsewhere.[54] Neither questions that consumers in these corridors are better off because of price competition from the incumbent BOC.[55]

2. *Southwestern Bell Is Suited To Break Up the Interexchange Oligopoly in Oklahoma*

Southwestern Bell will offer consumers these same sorts of competitive benefits when it provides in-region, interLATA service in Oklahoma.

Southwestern Bell has an affirmative incentive to lower long distance prices in Oklahoma, because increased interLATA usage will increase usage of Southwestern Bell's access services as well. David Sibley and Dennis Weisman, who have investigated the economic incentives of BOCs that have interLATA operations (and whose work has been cited as supposed support for the interexchange carriers' theories, see MCI Comments (South Carolina), Ex. D., Hall Aff. ¶¶ 110-114), explain that SBC likely "would not have incentives to discriminate against rivals [in the interexchange business] but, in fact, to act in a pro-competitive

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26 (FCC filed Oct. 23, 1996) ("AT&T Waiver Petition").

53. Id. at 3.

54. See id. at 1, 5; MCI Comments at 1, AT&T Petition for Waiver of Section 64.1701 of the Commission's Rules, CC Docket No. 96-26 (CPD filed Nov. 18, 1996) ("MCI Comments") (petitioning the Commission "so that [MCI] likewise will be in a position to benefit consumers by being able to compete effectively against Bell Atlantic and AT&T").

55. See AT&T Waiver Petition at 5 (consumers in the corridors, unlike other areas, "benefit from the highest degree of competition possible"); MCI Comments at 3 ("fully support[ing]" AT&T's "arguments").

manner" that protects SWBT's access revenues by increasing interLATA traffic. Sibley/Weisman 1997 Reply Aff. ¶ 27. Indeed, in the wake of a United States District Court opinion concerning the constitutionality of section 271, Southwestern Bell recently filed an application with the OCC to offer interLATA service to Oklahoma consumers for an introductory flat rate of 9 cents per minute through the end of 1998 for customers who sign up for service in the first 90 days, to be followed by a rate of 14 cents per minute any time, any day, no fees, no strings attached. These rates are not only significantly lower than AT&T's basic rate of 28 cents, but also lower than AT&T's discounted rates. See Schmalensee Aff. ¶ 14 (discussing AT&T's rates). It should be remembered, moreover, that more than 60 percent of AT&T's customers nationwide are paying AT&T's basic rate of 28 cents. Id. ¶ 12. If these national percentages hold true for Oklahoma, nearly two-thirds of AT&T's customers would be able to cut their long distance bills by 50 to 67 percent by switching to Southwestern Bell's interLATA service.

Southwestern Bell has honed its marketing skills as a wireless carrier in Oklahoma, as well as a provider of other competitive offerings such as exchange access to business customers, Centrex service, customer premises equipment, and directories. Id. ¶ 37. These experiences will enable Southwestern Bell to provide better interexchange services to Oklahomans and to sell these services effectively. See id. ¶¶ 32-39. Southwestern Bell also could reduce costs by using existing sales and customer support systems (in compliance with the requirements of section 272). See id. ¶ 31; Kahn & Tardiff Aff. ¶ 35-41. AT&T secured approval to acquire McCaw in part on such grounds. Applications of Craig O. McCaw, 9 FCC Rcd 5836, 5885, ¶ 83 (1994), aff'd sub nom. SBC Communications Inc. v. FCC 56 F.3d 1484 (D.C. Cir. 1995).

Unlike the smaller resellers currently in the market, Southwestern Bell has the size to negotiate substantial volume discounts from facilities-based interexchange carriers. Kahn & Tardiff Aff. ¶ 34. And unlike these smaller resellers, Southwestern Bell has a strong brand name that will immediately make it a strong competitor to the three major incumbents.[56] Southwestern Bell's reputation is on par with that of the major incumbent interexchange carriers: better than three out of four customers rated Southwestern Bell as "very good" in the categories of customer service and service reliability/product quality. Schmalensee Aff. ¶¶ 32-33. These factors will give Southwestern Bell lower marketing costs in-region than other potential new entrants, and will allow it to challenge the Big Three for low-usage customers — customers who, although the single largest group served by interexchange carriers, are nevertheless neglected in the competition to serve big businesses. Id. ¶¶ 28-30. Indeed, the failure of the Big Three to market services to this group leads many residential and small business customers to choose AT&T out of inertia, without giving other carriers serious consideration. See id. ¶¶ 27-28. If Southwestern Bell (and other BOCs across the country) can make competitive inroads, however, AT&T, MCI, and Sprint are likely to respond with new promotions and expanded eligibility for targeted offerings, to the benefit of low-volume callers. Id. ¶ 30.

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[56] See Schmalensee Aff. ¶32-33, 52; Kahn & Tardiff ¶ 33; see also Applications of Craig O. McCaw, 9 FCC Rcd at 5871-72, ¶ 57 (AT&T's acquisition of McCaw would serve the public interest due to AT&T's brand name, financial strength, marketing experience, and technological know-how).

Likewise, Southwestern Bell will be able to offer bundled service offerings and "one stop shopping." Southwestern Bell will not be the only, or even the first, carrier to market bundled offerings, and it will have no unfair advantage in providing bundled packages. A recent study by J.D. Power and Associates found that two thirds of households are likely to sign up with one company for all their telecommunications services, with the majority choosing their current long distance carrier as that sole provider. Gordon Aff. ¶ 26 n.27. Bundled service packages can "have clear advantages for the public," such as greater convenience and the ability to secure volume discounts by aggregating purchases of different services.[57] The rivalry between SNET and AT&T in Connecticut — which quickly spilled over from interstate services to intrastate toll — indicates how, in a world of bundled service offerings, greater competition in interLATA services will benefit Oklahoma consumers across a range of telecommunications services including local and intraLATA toll. Gordon Aff. ¶¶ 22, 26; Kahn & Tardiff Aff. ¶ 76. The Commission thus has supported developments that promise to speed the introduction of bundled services at the retail level. This was one reason why the Commission approved AT&T's buyout of McCaw Cellular Communications, saying it "would deny users the current and prospective benefits of bundling only if presented with a compelling public interest justification" for doing so. Applications of Craig O. McCaw, 9 FCC Rcd at 5880, ¶ 75.

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[57] Applications of Craig O. McCaw, 9 FCC Rcd at 5879-80, ¶¶ 73-75; see 142 Cong. Rec. S714 (daily ed. Feb. 1, 1996) (statements of Sen. Harkin) (1996 Act will allow "low cost integrated service, with the convenience of having only one vendor and one bill to deal with"); S. Rep. No. 104-23, at 43 (1995) (joint offerings constitute a "significant competitive marketing tool").

Not surprisingly, bundled offerings are the cornerstone of interexchange carriers' plans for entering the local exchange. AT&T, for example, has announced that it plans to "take a basic $25-a-month long distance customer and convert him or her into a $100-a-month customer for a broader bundle of services." AT&T Challenges the Bell Companies, Wall St. J., June 12, 1996, at A3; see Gordon Aff. ¶ 26. AT&T's Chairman and CEO recently stated that, at his company, "[t]here'll be bundles breaking out all over."[58] MCI is offering long distance, cellular service, Internet access, and MCImetro local service on the same bill in some states. Gordon Aff. ¶ 26. Sprint is bundling its long distance offerings with local wireline service, cable television, Internet, and PCS offerings. Kahn & Tardiff Aff. ¶ 87. Following MFS Communications' merger with the Internet access provider UUNet and the long distance carrier WorldCom (to form the entity that now intends to buy MCI), the merged entity's President explained: "We are creating the first company since the breakup of AT&T to bundle together local and long-distance service carried over an international end-to-end fiber network owned or controlled by a single company."[59] In light of MCI's announced merger with WorldCom, which effectively eliminates the only nationwide, facilities-based entrant into the interLATA markets to appear since the breakup of the Bell system, the need for BOCs to enter and energize these markets is now more acute than ever.

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58. See AT&T's Armstrong Announces Job Cuts, Says Senior Management 'Owns Strategy', Communications Daily, Jan. 27, 1998, at 2.

59. Communications Firms To Join in $12-Billion Deal, Los Angeles Times, Aug. 27, 1996, at A-1.

Approval of Southwestern Bell's application also will lift remaining prohibitions on Southwestern Bell's participation in telecommunications equipment manufacturing and allow Southwestern Bell to pursue all opportunities in this area, subject to statutory and regulatory safeguards. See 47 U.S.C. § 273(a); S. Rep. No. 104-23, at 67 (allowing BOCs to engage in manufacturing will "foster competition . . . and create jobs along the way"). Southwestern Bell's entry into long distance in Oklahoma will lead to a faster expansion of the Oklahoma economy, will create more than 10,000 new jobs for Oklahomans over the next ten years, and will boost the gross state product by nearly three-quarters of a billion dollars. See WEFA Report Figs. 5 & 6. These estimates are conservative and the benefits to the Oklahoma economy may well prove to be greater. Dauffenbach Aff. at 8.

Finally, approval of this application would trigger "1+" intraLATA competition in Oklahoma, intensifying competition in the intraLATA toll market as well. See 47 U.S.C. § 271(e)(2). At the time that Southwestern Bell is allowed to offer long distance service, it will provide intraLATA dialing parity. Because all SWBT central office switches in Oklahoma are currently equipped to provide two PIC codes to allow end users to select their interLATA and intraLATA toll service provider, 1+ intraLATA toll dialing could be implemented by Southwestern Bell almost immediately. Deere Aff. ¶ 177.

In other proceedings, the incumbent interexchange carriers and the DOJ have questioned the magnitude of the consumer savings that will result from BOC entry into long distance. See DOJ South Carolina Evaluation at 48-49. The important thing, however, is the indisputable fact of significant consumer benefits from greater interLATA competition. Even the DOJ's consultant, for instance, "expect[s] price reductions." Schwartz Supplemental Aff. ¶ 77 (DOJ South Carolina Evaluation Ex. 2). The exact number of billions of dollars of consumer benefits is nearly immaterial for purposes of this application, because the public interest requires that consumers be allowed to reap <u>any</u> possible benefits from competitive markets where, as here, there are no offsetting costs.

D. Southwestern Bell's Entry into the InterLATA Market, Subject to Extensive Statutory and Regulatory Safeguards, Presents No Risk to Competition

For all its potential strengths as a competitor, Southwestern Bell has absolutely no ability to impede competition by entering the interLATA market in Oklahoma. The 1996 Act and regulatory reforms have rendered 20-year-old worries about cross-subsidy and network discrimination obsolete.

1. Regulation and Practical Constraints Make "Leveraging" Strategies Impossible To Accomplish

In light of the federal and state safeguards that prevent BOCs from engaging in anticompetitive conduct upon entering long distance, the Commission recently held that BOCs should be regulated as non-dominant when they provide in-region, interLATA services.[60] It found that BOCs could not drive other interexchange carriers from the market through cost misallocation, that federal and state price caps reduce incentives to misallocate costs, and that existing safeguards "will constrain a BOC's ability to allocate costs improperly and make it

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60. Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, <u>Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace</u>, 12 FCC Rcd 15756 (1997) ("<u>BOC Non-Dominance Order</u>").

easier to detect any improper allocation of costs that may occur." BOC Non-Dominance Order, 12 FCC Rcd at 15817, ¶ 105. The Commission likewise dismissed fears of predation against the established long distance incumbents, id. at 15819, ¶ 108; found that the numerous protections against discrimination will prevent BOCs from gaining market power upon entry through such tactics, id. at 15821-15826, ¶¶ 111-119; and concluded that any risk of price squeezes can be addressed through FCC procedures and the antitrust laws, id. at 15831-15832, ¶¶ 128-129. Finally, the Commission recognized "that the entry of the BOC interLATA affiliates into the provision of in-region, interLATA services has the potential to increase price competition and lead to innovative new services and market efficiencies." Id. at 15835, ¶ 134.

Each of these conclusions is buttressed by the success that federal and state regulators have had in regulating BOCs over the years, as well as by the new, additional safeguards imposed by the 1996 Act and the Commission's implementing regulations.

a. Cost Misallocation. Theories that Southwestern Bell might shift costs incurred in providing interLATA services to local ratepayers, thereby giving itself a competitive edge as an interLATA carrier, are premised upon the assumption that Southwestern Bell "is regulated under rate-of-return regulation."[61] To cure this potential problem at its origin, the Commission has overhauled its approach to rate regulation, adopting a price cap regime that

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[61] Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 11 FCC Rcd 18877, 18882-83, ¶ 7 (1996) ("Non-Accounting Safeguards NPRM."). The Department of Justice contended in supporting approval of the MFJ that the Bell System's alleged practice of subsidizing its competitive offerings at ratepayers' expense "stem[med] . . . directly from AT&T's status as a rate of return regulated firm . . . " Competitive Impact Statement at 13, United States v. AT&T, No. 74-1698 (D.D.C. filed Feb. 10, 1982).

sets maximum rates almost entirely without regard to costs, thereby giving LECs "a powerful profit incentive" to cut the costs of their regulated services. National Rural Telecom Ass'n v. FCC, 988 F.2d 174, 178 (D.C. Cir. 1993); Gordon Aff. ¶ 31. There is no "reward for shifting costs from unregulated activities into regulated ones, for the higher costs will not produce higher legal ceiling prices." National Rural Telecom Ass'n v. FCC, 988 F.2d at 178; see Non-Accounting Safeguards NPRM, 11 FCC Rcd at 18942-43, ¶ 136 (Commission's price cap policies "reduce the potential that the BOCs would improperly allocate the costs of their affiliates' interLATA services"). Indeed, the Commission has described price cap regulation as providing strong "efficiency incentives" to keep down costs allocated to regulated services.[62]

Congress nevertheless took steps to address supposed worries about possible cost misallocation. In section 272 of the 1996 Act, Congress sharply reduced opportunities for cost-shifting by requiring that a BOC provide long distance service through an affiliate that has separate facilities, employees, and record-keeping from the local telephone company. 47 U.S.C. § 272. Moreover, Congress reinforced structural separation with demanding accounting requirements. See id. § 272(d). Legislators concluded, after hearing arguments on all sides, that

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[62] Report and Order, Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, 11 FCC Rcd 17539, 17605-06, ¶ 145 (1996) ("Accounting Safeguards Order"); see also Illinois Pub. Telecomm. Ass'n v. FCC, 117 F.3d 555, 570 (D.C. Cir.) (under price caps "risk of loss" is borne by "investors rather than ratepayers"), clarified on reh'g, 123 F.3d 693 (D.C. Cir. 1997), petition for cert. Pending, No. 97-1072 (Dec. 29, 1997). To the extent that improper cost-sharing may formerly have been a concern, see Non-Accounting Safeguards NPRM, 11 FCC Rcd at 18942-43, ¶ 136, that concern is addressed by the Commission's recent decision to eliminate sharing entirely. Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, Price Cap Performance Review for Local Exchange Carriers and Access Charge Reform, 12 FCC Rcd 16642, 16699-703, ¶¶ 147-155 (1997).

these statutory safeguards and the Commission's implementing rules would be sufficient to deal with concerns about BOC cost misallocation. See, e.g., id. § 254(k) (requiring Commission to implement regulations as necessary "to ensure that" revenues from regulated services are not used to subsidize competitively provided services). The Commission has likewise expressed confidence in the efficacy of structural separation in various contexts.[63]

Beyond this statutory requirement, the Commission has explained that its preexisting "cost allocation and affiliate transactions rules, in combination with audits, tariff review, and the complaint process, have proven successful at protecting regulated ratepayers from bearing the risks and costs of incumbent local exchange carriers' competitive ventures." Accounting Safeguards Order, 11 FCC Rcd at 17550-51, ¶ 25. The Commission reasoned that these rules together "will effectively prevent predatory behavior that might result from cross-subsidization," and that because they "have proven generally effective" there was "no reason to require a change to a different system." Id. at 17551, ¶ 28, 17586, ¶ 108; see also First Report and Order, Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges; 12 FCC Rcd 15982, 16104, ¶ 283 (1997) ("Access Reform Order") (price caps protect against cross-subsidization).

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63. Report and Order, Inquiry into the Use of the Bands 825-845 MHZ and 870-890 MHZ for Cellular Communications Sys., 86 F.C.C. 2d 469, 494, ¶ 50 (1981) (cellular); Final Decision, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 453, ¶ 177 (1980) (Bell System), aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198, 211 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983); Gordon Aff. ¶ 32.

At the state level, legislators and regulators have an "overwhelming concern for keeping the rates for local residential service low," and consequently have a powerful reason to prevent cost-shifting from unregulated activities to regulated telephone services. United States v. Western Elec. Co., 993 F.2d 1572, 1581 (D.C. Cir.), cert. denied, 510 U.S. 984 (1993). Moreover, the OCC requires SWBT to follow the Uniform System of Accounts and the Commission's Part 32 rules, unless otherwise authorized by the OCC. See OAC § 165:55-2-11.

b. Other Pricing Strategies. Just as cost misallocation would be impossible to accomplish, Southwestern Bell would not and could not raise the cost of its access services in an effort to effectuate a "price squeeze" on other interexchange carriers.[64] The Commission has cited a host of factors that "constrain the ability of a BOC or its interLATA affiliate to engage in a predatory price squeeze," and concluded that BOCs "will not be able to engage in a price squeeze to such an extent that the BOC interLATA affiliates will have the ability, upon entry or soon thereafter, to raise price by restricting their own output." BOC Non-Dominance Order, 12 FCC Rcd at 15832, ¶ 129; see also Access Reform Order, 12 FCC Rcd at 16101, ¶ 278 ("we have in place adequate safeguards against such conduct"). The Commission likewise concluded that a strategy of providing long distance services below cost to drive out competitors could not be profitable for BOCs because losses incurred in predation could not later be recovered through supra-competitive pricing. BOC Non-Dominance Order, 12 FCC Rcd at 15815-16, ¶ 108; see also Non-Accounting Safeguards NPRM, 11 FCC Rcd at 18943-44, ¶ 137.

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64. See generally Town of Concord v. Boston Edison Co., 915 F.2d 17, 18 (1st Cir. 1990) (per Breyer, J.) (discussing theory of price squeezes), cert. denied, 499 U.S. 931 (1991).

Wholly aside from regulatory safeguards, "predatory pricing schemes are rarely tried, and even more rarely successful." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993) (citations omitted). In an industry with standardized technologies and sophisticated, well-financed incumbents who have made mammoth sunk investments, any attempt at predatory pricing would be doomed. Kahn & Tardiff Aff. ¶ 46; see also Gordon Aff. ¶ 34. Even AT&T has conceded that "there is little reason to fear that a BOC could monopolize the interexchange market" by driving the major incumbents out of business.[65]

c. Price Discrimination. Perhaps the weakest of all theories advanced by those with a vested interest in delaying interLATA competition is that BOCs might discriminate in the pricing of their exchange access services. The Commission has for years "require[d] any exchange carrier offering interexchange service to impute to itself the same costs that it uses to develop the access rates that it charges its interexchange customers." Order on Reconsideration, Policy and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd 2637, 2714, ¶ 168 (1991). Consistent with that regulatory requirement, Congress specifically provided that a BOC must charge its affiliate, or impute to itself, "an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service." 47 U.S.C. § 272(e)(3). The Commission thus rightly has concluded that "the statutory and regulatory safeguards . . . will prevent a BOC from discriminating to such an extent that its interLATA affiliate would have the ability, upon entry

[65]. AT&T's Opposition to Ameritech's Motions for "Permanent" and "Temporary" Waivers from the Interexchange Restriction of Decree at 26, United States v. Western Elec. Co., No. 82-0192 (DOJ filed Feb. 15, 1994) (App. D, Tab __).

or shortly thereafter, to raise the price of in-region, interstate, domestic, interLATA services." BOC Non-Dominance Order, 12 FCC Rcd at 15825, ¶ 119; Gordon Aff. ¶¶ 35-36.

d. Technical Discrimination. Theories that Southwestern Bell might impede competition by engaging in technical discrimination are equally unfounded. AT&T, MCI/British Telecom/WorldCom, and Sprint/Centel/Deutsche Telekom/France Telecom are sophisticated, vertically integrated goliaths with revenues much greater than Southwestern Bell's, and with the expertise and resources to detect and challenge systematic discrimination. Cf. United States v. Western Elec. Co., 993 F.2d at 1580 ("[I]nformation service giants operating throughout the country, such as IBM, AT&T and GE, will notice any discrepancies in treatment by the various BOCs and will have the capacity and incentive to bring anticompetitive conduct to the attention of regulatory agencies.").

Indeed, to state how discrimination against them would have to occur is virtually to prove its impossibility: In order to gain an anticompetitive edge, Southwestern Bell would have to provide inferior access services to its major competitors without disrupting its own local or long distance services, in a fashion that cannot be proved by other interexchange carriers or detected by regulators, yet is so apparent to customers that it drives them to switch to Southwestern Bell's long distance service, but not the service of some other competitor. See id. at 1579 (noting that discrimination is unlikely where "customers could readily shift to the BOC's larger competitors"). When one considers these realities, it is not surprising that incumbent interexchange carriers never have produced specifics (much less hard evidence) as to the precise form hypothetical future discrimination would take, how it is feasible, what effect it would have on consumer decision-making, what costs it would impose on interexchange carriers, or how it would reduce competition and increase prices. Competitively meaningful discrimination simply cannot go undetected.

Furthermore, Southwestern Bell has been providing exchange access services to the long distance industry for more than a dozen years. From a technical standpoint, SWBT cannot discriminate against CLECs, and any such attempts would be easily detected. Deere Aff. ¶¶ 177-225. Interexchange carriers can and do directly monitor Southwestern Bell's performance, in large part through performance measurements provided by Southwestern Bell. In fact, Southwestern Bell's interconnection arrangements with interexchange carriers establish specific criteria for service quality and procedures for the interexchange carrier to monitor Southwestern Bell's performance. Id. ¶¶ 220-224.

The Commission recently rejected additional reporting requirements because "sufficient mechanisms already exist within the 1996 Act both to deter anticompetitive behavior and to facilitate the detection of potential violations of section 272 requirements." Non-Accounting Safeguards Order, 11 FCC Rcd at 22060-61, ¶ 321. Indeed, the Commission explained that "the reporting requirements required by the 1996 Act, those required under state law, and those that may be incorporated into interconnection agreements negotiated in good faith between BOCs and competing carriers will collectively minimize the potential for anticompetitive conduct by the BOC in its interexchange operations. In addition to deterring potential anticompetitive behavior, these information disclosures will also facilitate detection of potential violations of the section 272 requirements." Id. at 22063, ¶ 327.

Suggestions that a BOC might seek to slow-roll interexchange carriers in developing and implementing new access arrangements are equally unfounded. The 1996 Act provides that a BOC "may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards," 47 U.S.C. § 272(c)(1); must "fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates," id. § 272(e)(1); and may not provide facilities, services, or information concerning exchange access to its long distance affiliate unless they are made available to other providers of interLATA service on the same terms and conditions, id. § 272(e)(2), (4).

Regulators should have no trouble enforcing these requirements. Gordon Aff. ¶ 40. The Commission has explained that existing rules relating to enhanced services and customer premises equipment currently protect against analogous discrimination. Non-Accounting Safeguards NPRM, 11 FCC Rcd at 18915-16, ¶ 75. Moreover, access revenues account for approximately 33.6 percent of SWBT's total operating revenues.[66] Southwestern Bell therefore has an affirmative incentive to provide higher-quality or lower-cost access to interexchange carriers, so as to increase demand for its exchange access services and avoid the loss of access revenues that would result if interexchange carriers provided their own access services or obtained access services from a facilities-based competitor to Southwestern Bell. See

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66. Federal Communications Comm'n, Statistics of Communications Common Carriers 76 (1996-97 ed.).

Sibley/Weisman 1997 Reply Aff. ¶ 27. All that will be required in the context of new exchange access arrangements is an evolution of existing, routinized, and mutually advantageous arrangements between interexchange carriers and Southwestern Bell, which leave no room or reason for misconduct.

e. Misuse of Confidential Information. Section 272(c)(1) prohibits a BOC from discriminating "in the provision or procurement of goods, services, facilities, or information." The Commission has interpreted "information" in section 272(c)(1) so that it "includes, but is not limited to, CPNI and network disclosure information." Non-Accounting Safeguards Order, 11 FCC Rcd at 22010, ¶ 222. Accordingly, a BOC must make such information available to other interexchange carriers on the same terms and conditions as its own long distance affiliate. Id.

The Commission has explained that its "current network disclosure rules are sufficient to meet the requirement of section 272(e)(2) that BOCs disclose any 'information concerning . . . exchange access' on a nondiscriminatory basis." Id. at 22026, ¶ 253. Commission regulations also have long governed, and will continue to regulate, access to competitively useful information concerning particular customers. See id. at 22010, ¶ 222 (noting separate CPNI proceeding). Under the Commission's rules, for example, BOCs must disclose CPNI to unaffiliated enhanced service providers and Customer Premises Equipment ("CPE") suppliers at the customer's request; bar their own enhanced service sales personnel from accessing certain

CPNI without customer authorization; and notify multi-line business customers of their CPNI rights each year.[67]

It should be stressed that Southwestern Bell will fully comply with the requirements of 27 U.S.C. § 222 in its use of CPNI. Watts Aff. ¶ 4. In order to ensure this compliance, all management employees will be provided with a copy of section 222, the Commission's rules interpreting this section, and a guide that describes all of the requirements under the section and the Commission's rules. Id. ¶ 8. In addition, the Commission's rules regarding section 222 will be incorporated into SBC's Code of Business Conduct. Id. ¶ 12. This Code of Business Conduct already contains explicit instructions regarding the confidentiality of customers' communications, transmissions, or information processing arrangements, and employees are warned that violations of any of the policies in the Code of Business Conduct can result in disciplinary actions, including dismissal and criminal prosecution. Id. ¶ 5.[68]

f. Penalties. In light of its inability to engage in cost misallocation or any form of discrimination, there simply would be no reason for Southwestern Bell to risk the substantial penalties likely to follow such a fruitless endeavor. If Southwestern Bell were to

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67. See Report and Order, Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 2 FCC Rcd 143, 153, ¶ 66 (1987), on recon., 3 FCC Rcd 22 (1987), petition for review denied, Illinois Bell Tel. Co. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); Report and Order, Computer III Remand Proceedings: Bell Operating Company Safeguards, 6 FCC Rcd 7571, 7602-14, ¶¶ 68-95 (1991).

68. In implementing any local customer winback program, moreover, SWBT will comply with the requirements of section 222. Wilkinson Aff. ¶ B.1. In its recently completed winback of local service program in Oklahoma and four other states, for example, the marketing group in charge of this program did not have access to any CLEC-specific information. Id. ¶ C.1.

violate any provision of the Communications Act it would be required to pay civil fines, 47 U.S.C. § 202(c), and would be liable to injured parties for the amount of their injuries plus attorneys' fees, id. §§ 206-207. In addition, section 220(e) of the Communications Act imposes criminal penalties for false entries in the books of a common carrier — a strong deterrent against purposeful violations of the accounting requirements described above. Sections 501 through 504 provide additional penalties — including imprisonment, fines, and forfeiture — for knowing violations of any statutory or regulatory provision. Moreover, if the Commission determines that Southwestern Bell "has ceased to meet any of the conditions required for" interLATA entry, it may revoke interLATA authority under section 271(d)(6).[69]

All of the Act's and the Commission's specific statutory and regulatory protections are backed up by federal and state antitrust laws. The weighty corporate and personal penalties (including imprisonment) that may be levied against violators of the antitrust laws, combined with the near impossibility of keeping systematic discrimination or cost-shifting secret, make it most unlikely that BOC managers would order unlawful practices.[70]

Given its own decisions noting the strength of all these various statutory and regulatory protections, the Commission could hardly find them inadequate to the task in this case.

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[69]. The Commission has ruled that once a complainant makes a prima facie showing that a BOC has "ceased to meet the conditions of entry," the burden shifts to the BOC to produce evidence of its compliance. Non-Accounting Safeguards Order, 11 FCC Rcd at 22072, ¶ 345. This is a complete answer to claims that discrimination and cross-subsidy, even though detectable, might be hard for rival interexchange carriers to prove.

[70]. See, e.g., 15 U.S.C. §§ 1, 2 (Sherman Act); United States Sentencing Comm'n, Guidelines Manual § 2R1.1 (requiring prison sentences for a number of antitrust violations).

Moreover, the Commission recently determined, in approving British Telecom's proposed acquisition of MCI, that regulations in the United Kingdom "ensure proper cost allocation, timely and nondiscriminatory disclosure of network technical information, and protection of carrier and customer proprietary information against unauthorized disclosure," and thereby "control BT's market power" in the provision of access services. Memorandum Opinion and Order, Merger of MCI Communications Corp. and British Telecommunications plc, 12 FCC Rcd 15351, 15429, ¶ 203 n.288 (1997). The United Kingdom's safeguards, however, are weaker than those under the Act and this Commission's regulations, see id. at 15436-39, ¶¶ 218-223, and do not even include equal access, unbundling, or resale, id. at 15429, ¶ 202. If the United Kingdom's regulations and the potential for future competition would have been sufficient to prevent harm from BT's vertical integration with MCI, see id. at 15432, ¶ 210, then the much stronger U.S. safeguards and the openness of Oklahoma markets to competitors under the checklist must be sufficient to address any analogous concerns raised in this proceeding.

2. *Actual Experience with LEC Participation in Adjacent Markets Disproves Theories about Anticompetitive Potential*

SBLD's inability to raise prices or restrict output as an interexchange carrier in Oklahoma is confirmed by more than a decade of experience with LEC entry into markets adjacent to the local exchange, including, in some instances, long distance service. As noted earlier, LECs have competed fairly and effectively where they have been permitted to offer long distance. One would not have expected such competitive benefits based on the doomsday predictions of potential competitors, which were of the same ilk as the arguments they will make in opposing this application.

Cellular Services. Grim predictions of future harm to the public interest preceded BOC participation in the cellular business. See, e.g., 825-845 MHZ Inquiry, 86 F.C.C.2d at 469, 530-31, 540-43, 550-51, 643 (summarizing comments of Millicom, Telocator, and the DOJ). Given that cellular carriers and interexchange carriers have similar local interconnection requirements, BOCs have had essentially the same incentive and ability to act anticompetitively against rival cellular carriers as they would have to act anticompetitively against other interexchange carriers in in-region states. See Kahn & Tardiff Aff. ¶¶ 77-79; Gordon Aff. ¶¶ 37-38. Yet, this theoretical incentive of wireline carriers to inhibit cellular growth has not created any actual problems. The Commission has confirmed "the infrequency of interconnection problems" between local exchange carriers and unaffiliated cellular providers. Report and Order, Eligibility for the Specialized Mobile Radio Servs., 10 FCC Rcd 6280, 6293, ¶ 22 (1995). Indeed, "the wireless communications business is one in which relatively small, entrepreneurial competitors have often been as successful as . . . the BOCs." Applications of Craig O. McCaw, 9 FCC Rcd at 5861-62, ¶ 38.

BOCs, who would know if incumbent local telephone companies could give their cellular affiliates an unfair competitive edge, have invested heavily in cellular systems that compete with the incumbent LECs' systems. Kahn & Tardiff Aff. ¶ 79 ("Though [incumbent LECs] are presumably most knowledgeable about the real risks of anti-competitive conduct directed at them by the incumbent wireline carriers, the number of territories in which telephone company cellular affiliates compete with one another has grown rapidly from about 5 in 1986 to more than 30 in 1995."). Such investments would not have been made if BOCs really believed that LECs